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No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner G.D. Searle & Co. ("Searle") respectfully submits this reply brief in further support of its petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

1. Searle's petition raises substantial legal issues concerning whether, in pending mass tort litigation, lawyers coordinating the claims of many plaintiffs can compel disclosure of a defendant's aggregate estimates of litigation reserves which are based on the defendant's attorney's assessment of the settlement value of, and anticipated litigation expenses to defend against, individual plaintiff's

claims. Respondents argue in opposition that these issues "present[ ] only a factual dispute, not an important question of federal law." (Br. Opp. at 7.) This argument is untenable. The scope of the legal protection afforded Searle's attorneys' work product and privileged communications presents legal not factual issues. Moreover, the facts giving rise to this dispute are not unique; they are common to the vast majority of mass tort cases.

The issues presented by Searle's petition affect practically all companies facing mass tort product liability claims. As the five amici curiae representing thousands of companies substantiate, the procedures followed by Searle in setting aggregate case reserves are common to many companies; indeed, most businesses faced with mass tort claims customarily utilize procedures that are similar, if not identical, to those followed by Searle.[1] The practice of setting aggregate case reserves has become a virtual necessity for these businesses in the wake of the recent explosive rate of growth in mass tort litigation in this country, a phenomenon whose existence respondents do not dispute. The practice is a means to assist in planning the strategy of litigation and settlement, and assures that there will be funds for a potential recovery, if any. Far from being isolated or fact-specific, the legal issues presented here are echoed in tens of thousands of lawsuits nationwide. The outcome of this case will have enormous impact.

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[1] *See* Brief Amicus Curiae of Chamber of Commerce of the United States in Support of Petition for Certiorari, at 3-4; Brief Amicus Curiae of Pharmaceutical Manufacturers Association in Support of Petition for Certiorari, at 2-3; Brief Amicus Curiae of American Insurance Association in Support of Petition for Certiorari, at 2.

2. In its petition for a writ of certiorari, Searle demonstrated that the Eighth Circuit's unprecedented decision to compel disclosure of confidential aggregate case reserves, despite plaintiffs' failure to make any showing of need for them, directly conflicts with this Court's teachings in *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383 (1981), as well as the holdings of all other courts of appeals which have addressed this issue. Respondents' assertion (Br. Opp. at 4) that "factual findings" by a special master concerning the documents' relevance and plaintiffs' alleged need for them were adopted by the court of appeals is patently false; the court of appeals actually rebuffed any such findings. (App. 15.) Indeed, the court of appeals acknowledged that Searle's aggregate case reserves, which were reflected in the sample documents submitted to the Court and are unrelated to the manufacturing and marketing of Searle's products, would afford plaintiffs "nothing in the way of admissible evidence on the issue of liability or on the issue of damages." (App. 15.) Thus, contrary to respondents' misstatement, the Eighth Circuit did *not* hold that the aggregate case reserves were relevant or calculated to lead to discoverable evidence, nor did the court of appeals determine that plaintiffs had any substantial need for them.

Plaintiffs have never offered proof of need for this confidential information, and none exists. Instead, plaintiffs merely have advanced self-serving promises that "no plaintiff's attorney will attempt to negotiate settlement on the basis of aggregate or average reserve figures" (Br. Opp. at 14-15); but plaintiffs never explain what other possible purpose the aggregate reserve information might have. By compelling disclosure of Searle's confidential aggregate case reserves even though plaintiffs failed to make

any showing of need, let alone the extraordinary need required to discover attorneys' mental impressions, the Eighth Circuit eviscerated the special, almost absolute, protection traditionally accorded opinion work product.

3. Respondents also rely upon the inapposite decision in *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984) (Br. Opp. at 10-11). In *El Paso*, the issue was whether the work product doctrine covers tax accrual work papers about which attorneys were not consulted and which were not prepared in anticipation of any litigation or in connection with any pending litigation. *El Paso*, 682 F.2d at 534-35, 543. Unlike the tax accrual work papers in *El Paso*, Searle's aggregate case reserve documents are prepared with the input of Searle's legal counsel, who assess and form opinions based on individual case reserves in litigation that already has been filed against the company. (Affidavit of Eugene W. Bader, June 8, 1984, Para. 9.) Indeed, the special master specifically found that Searle's aggregate case reserves revealed "to some extent" the methodology of its attorneys in setting the individual case reserves and that "[p]laintiffs could take an aggregate reserve and determine an average reserve per case, which arguably gives plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." (App. 31, 39.) As Judge Gibson recognized in his dissent, there is "a deep inconsistency" in the majority's "protecting the parts but determining that the sum of the parts and calculations based upon the protected figures are not protected" particularly where, as here, "within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance." (App. 15, 21.)

Searle's aggregate case reserves reflect confidential attorney-client communications and are prepared in anticipation of litigation. As the numerical representation of the value of these cases, they are the paradigm of opinion work product.

4. Respondents attempt to justify the Eighth Circuit's novel ruling by arguing that the attorney-client privilege and work product doctrine improperly restrict discovery and therefore should be curtailed. They wrongly charge that the benefits of the attorney-client privilege and the work product protections are "indirect and speculative", and that the protections "obstruct the search for truth." (Opp. Br. at 11.) While the Eighth Circuit's opinion may reflect the same underlying hostility to these protections, that hostility is contrary to this Court's well established precedent. The protections accorded such privileged information are rooted in sound principles of litigation fairness and public policy and should not be subject to novel restrictions which have a disparate impact on litigants faced with multiple suits as opposed to litigants faced with one or two cases. This Court's teachings in *Hickman v. Taylor*, 329 U.S. 495 (1947), and its progeny, recognize that a litigant attempting to consider all the factors that bear upon the decision to try or settle lawsuits would be placed at a severe and unfair disadvantage if the litigant could be compelled to divulge to its adversary confidential assessments of liability in ongoing litigation.

By compelling disclosure of aggregate case reserves, the Eighth Circuit has seriously handicapped all businesses defending mass tort cases and others engaged in multiple court cases. Under this ruling, businesses will be unable to communicate with their attorneys, to finance and plan for their defense, and to consider properly all

the factors that bear upon the decision to settle or try lawsuits. Plaintiffs have failed to explain how any public policy is served by requiring disclosure of this confidential information.

5. It is noteworthy that not even respondents embrace the Eighth Circuit's unprecedented conclusion that a defendant forced into mass tort litigation may have its business redefined by a court as the "business of litigation" and thereby lose the attorney-client privilege and work product protection routinely afforded other less frequently sued defendants. But that conclusion is the central underpinning for the Eighth Circuit's ruling. If the Eighth Circuit's holding is allowed to stand, it will completely confound the rule that documents prepared in anticipation of litigation are entitled to protection from compelled disclosure. Many litigants commonly face recurring litigation—including United States government enforcement agencies, regulated industries, liability insurers, manufacturers of consumer products, large scale employers, and securities brokers. Under the Eighth Circuit's novel logic, such government enforcement agencies and private concerns alike may be deemed to be in the "business of litigation" and therefore not entitled to invoke attorney-client privilege or work product protection for any litigation document shared with management.

No court has ever so eviscerated both the work product doctrine and the attorney-client privilege. Given the importance of the issues raised, the grave threat to the orderly administration of justice presented by the lower court's decision, and the manifest need for uniformity among the Circuits concerning the application in mass tort litigation of the work product and attorney-client privilege protections, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, G.D. Searle & Co. respectfully urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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